

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1489
~~8124~~

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UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket No. 77 - 8124

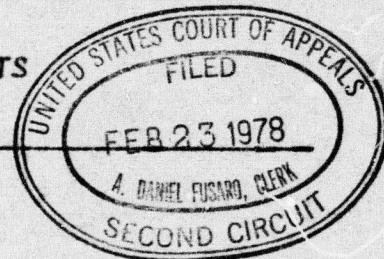
UNITED STATES OF AMERICA,
Appellee

-against-

PETER FRANK GIATTINO and
PATSY JOHN RAUCCI,
Appellant.

On Appeal From The United States
District Court For The Eastern District
Of New York

BRIEF FOR THE APPELLANTS



JAMES A. PASCARELLA
Attorney For Appellant
One Old Country Road
Carle Place, New York
(516) 742-1134

11514

TABLE OF CONTENTS

	<u>Page</u>
Preliminary Statement	1
Statement of the Case	3
A. Proceedings Prior to Trail	3
B. The Trail	11
C. The Hearing	21
ARGUMENT:	
<u>POINT I</u> - THE APPELLANTS WERE MISLED BY THE GOVERNMENT AND THEREBY SUFFERED UNDUE AND UNREASONABLE PREJUDICE	23
<u>POINT II</u> - THE PHOTOGRAPHIC SPREAD SHOWN CAROL FEIN AND THE SHOWUP IN THE CORRIDOR OUTSIDE THE COURT- ROOM CREATED A VERY SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MIS- IDENTIFICATION	28
<u>POINT III</u> - APPELLANTS WERE IMPROPERLY DENIED ACCESS TO EXCULPATORY MATERIAL	38
<u>POINT IV</u> - THE DISTRICT COURT COMMITTED ERROR IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL BASED ON NEWLY DIS- COVERED EVIDENCE AND IN THE INTEREST OF JUSTICE	40
CONCLUSION	41

TABLE OF AUTHORITIES

CASES:	<u>Page</u>
<u>Berger v. United States</u> , 295 U.S. 78,88 (1935).....	25
<u>Brady v. State of Maryland</u> , 373 U.S. 83 (1963)	38
<u>Foster v. California</u> , 394 U.S. 440 (1969)	30
<u>Gilbert v. California</u> , 388 U.S. 263 (1967)	30
<u>Gordon v. United States</u> , 344 U.S. 414 (1953)	40
<u>Manson v. Braithwaite</u> , 432 U.S. 98 (1977)	28, 29, 30, 34, 36
<u>Mesarosh v. United States</u> , 352 U.S. 1 (1956).....	40
<u>Neil v. Biggers</u> , 409 U.S. 109 (1972)	34
<u>Powell v. Alabama</u> , 287 U.S. 45 (1964)	36
<u>Stovall v. Denno</u> , 388 U.S. 293 (1967)	30, 36
<u>United States v. Agurs</u> , 427 U.S. 97 (1976)	25, 39
<u>United States v. Bonnono</u> , 430 F.2d 1060 (2d Cir. 1970)	39
<u>United States v. DeSapio</u> , 456 F.2d 644 (2d Cir. 1972)	40
<u>United States v. Famulari</u> , 447 F.2d 1377 (2d Cir. 1971)	29, 30, 33, 36
<u>U. S. ex rel. Gonzalez v. Zelker</u> , 477 F.2d (2d Cir. 1973)	28
<u>United States v. Houle</u> , 490 F.2d 167 (2d Cir. 1973)	39
<u>United States v. Miller</u> , 411 F.2d 825 (2d Cir. 1969)	25, 39
<u>United States ex rel. Phipps v. Follette</u> , 428 F.2d 912 (2d Cir. 1970)	31
<u>United States v. Polisi</u> , 416 F.2d 573 (2d Cir. 1973)	39
<u>United States v. Semensohn</u> , 421 F.2d 1206 (2d Cir. 1970)	25, 26

<u>United States v. Wade</u> , 388 U.S. 218 (1967).....	29, 36
---	--------

Rules:

Federal Rules Of Criminal Procedure, Rule 16	23
---	----

Other Authorities:

Report of House Committee on the Judiciary.....	23
Advisory Committee Note	24
Convicting the Innocent, Borchard	29
Identification Parades, Williams and Hammelman	29
The Science of Judicial Proof (3d ed), Wigmore	29

PRELIMINARY STATEMENT

Peter Frank Giattino and Patsy John Raucci appeal from a judgment entered in the United States District Court for the Eastern District of New York (Pratt, J.) on September 1, 1977, which judgment convicted appellants, after a jury trial of one count of a three count indictment involving violations of Title 26, United States Code, Sections 861(c), (d) and (i) and Title 18, United States Code, Section 2.

The first count of the indictment charged appellants with wilfully, knowingly and unlawfully possessing destructive devices, to wit, two Molotov cocktails, made without complying with the provisions of Title 26, United States Code, Section 5822.

Count Two of the indictment charged appellants with wilfully, knowingly and unlawfully possessing destructive devices, to wit, two Molotov cocktails, not registered to the appellants in the National Firearms Registration and Transfer Record.

The third count of the indictment charged appellants with wilfully, knowingly and unlawfully possessing destructive devices, to wit, two Molotov cocktails, not identified by serial numbers as required by Title 26, United States Code, Section 5842.

Judge Pratt, upon the conclusion of all the evidence in the case, dismissed the first and third counts against both appellants. The jury found both appellants guilty on Count Two on May 6, 1977.

On July 21, 1977, a hearing was conducted pursuant to appellants' motion to set aside the verdict of guilty and to enter a judgment of acquittal, or, in the alternative, to set

aside the verdict and grant them a new trial.

The District Court denied the motion, after hearing, by Memorandum and Order dated August 11, 1977. On August 19, 1977, appellants, by letter addressed to certain statements of the District Court in its decision of August 11, 1977, sought to submit affidavits or to have additional testimony taken so that the Court could reconsider its order. Judge Pratt, treating the letter as a motion for reconsideration of the Court's order of August 11, 1977, denied the motion by order dated August 24, 1977.

On September 1, 1977 appellant Giattino was sentenced to the custody of the Attorney General for a term of five years. Appellant Raucci was sentenced to the custody of the Attorney General for a term of six years. A stay in execution of sentence pending appeal has been granted each appellant by the District Court.

On September 9, 1977, appellants made motion for a new trial in the interest of justice and on the ground of newly discovery evidence. The District Court denied the relief sought, without hearing, by order dated November 4, 1977.

Notice of appeal of the judgment and orders was timely filed

STATEMENT OF THE CASE

A. Proceedings Prior to Trial

On August 8, 1976, appellants were arrested by police officers of the Suffolk County, New York, Police Department and charged with an attempted arson of a building in Oakdale, New York, housing a so-called "topless" bar and a booking agency for topless dancers. Some time shortly thereafter, Special Agent John Jensen of the United States Department of Alcohol, Tobacco and Firearms became involved in the case. The result was the federal indictment, which is the subject of this appeal, was filed on November 12, 1977.

Defense counsel, representing both appellants, conferred with Gary Woodfield, the Assistant United States Attorney then assigned the case, on several occasions. Counsel was advised, among other things, that discovery would be liberal and the Government's file virtually "open" to him. Counsel was to send an informal letter request for discovery and items of particulars. (H. 23).*

*"H" designates reference to the transcript of the hearing of July 21, 1977 (which is part of the record) to avoid confusion in pagination with the trial transcript.

"R" designates reference to the record (except for the hearing portion referred to above).

"A" designates reference to Appellants' Appendix.

On December 21, 1977, Assistant United States Attorney (AUSA) Edward Thompson contacted counsel and advised him that he (Thompson) was now assigned the case. Counsel advised Thompson he would forward the discovery letter to him. Thompson indicated, as did his predecessor, that the Government's file would be "open" that is, that there would be liberal discovery permitted and that he wanted to discuss the case further with counsel. The discovery letter was sent to Thompson on December 27, 1976. (H. 23-24).

The liberal discovery spoken of appeared to be a fact, for the Government provided a good deal of information to defense counsel, including a statement of who the Government's potential witnesses were. Further, numerous telephone and in person conversations between defense counsel and AUSA Thompson were had. At some of these conversations, Special Agent Jensen was present.

On January 4, 1977, at the United States Attorney's Office in Westbury, New York, a meeting was had, for purposes of discovery (prior to a scheduled court appearance on the matter scheduled for January 5, 1977), at which defense counsel, AUSA Thompson and Agent Jensen were present. Various requests for items of particulars and discovery were discussed and information was provided to defense counsel. The discussion included a review of the defense discovery letter, a viewing of approximately twenty photographs of the Doll House and its vicinity, what the arresting Suffolk County Police Officer, Arthur Reiersen, had related to the Government as to what occurred on August 8, 1976, a statement by Thompson and Jensen that they felt the topless talent agency (A&P Variety, Inc.) located above the Doll House in the same building was the actual target of the firebombs and not the Doll House itself, money found on the appellants at the

time of the arrest (approximately \$300.00 on Giattino and \$41.00 on Raucci), a conflict as to which appellant the Suffolk County Police had attributed certain alleged statements, an address book found on appellant Raucci, the fact that fingerprint tests were made but of no value, status of the Suffolk County case and other discovery information, including a statement by Thompson of who the Government's witnesses would probably be. The witnesses provided defense counsel were Police Officer Reiersen, Police Officer Colligan, Police Officer Rhoades, Detective Miller, Agent Jensen, various laboratory people from the Bureau of Alcohol, Tobacco and Firearms, Thomas Esagro (the owner of the Doll House), someone from A&P Variety, Inc. and the owner of the building involved.* Thompson and Jensen were to check into other areas of question by defense counsel and to advise him as soon as possible, perhaps by the next day.** (H. 25-29, 50-54, 68-69, 95; A. 138 - 167).

At this same meeting (January 4, 1977). Thompson and Jensen also indicated that appellant Giattino was known as a customer of the Doll House and had been involved in certain incidents involving his being loud and obscene (which, at a subsequent time, the Government advised counsel was not the case ie. Giattino had not been drunk and obscene). Defense counsel was also advised at this time that appellant Raucci was not known to have been a customer of the Doll House. (H. 26-29, 32-33, 94, 105, 110).

* Virtually no damage was done to the building. (R. 99-101).

** This additional information included whether anyone was brought to the precinct to try to identify the defendants, fingerprint report (any further findings), Raucci's arrest record, the supporting affidavit of Esagro in the Suffolk case, which of the appellants supposedly made certain alleged statements and what the Suffolk County authorities intended to do.

On January 5, 1977, after discussing the meeting of January 4, 1977 with appellants, defense counsel again met with AUSA Thompson and Agent Jensen in the same office as the previous day. This was just prior to appearing in District Court on the instant case for the purpose of a status report, including the situation regarding discovery. Defense Counsel stated to the Court that discovery was forthcoming and continuing and there appeared to be no need for formal motions, this, however, being dependant on the response to discovery questions still open. After the court appearance, the conference between Thompson, Jensen and defense counsel was resumed. At the conference the matters indicated as open from the day before were discussed. Some of these matters were answered, some remained open. Defense counsel was told that Thomas Esgro (owner of Doll House), Lyn Novotny (Esgro's manager and partner) and an Edward Perlauch (phonetic), a person associated with A&P Variety, Inc., were brought to the police precinct on August 8, 1976 to view the defendants but could not identify either of them. Defense counsel was also informed that the fingerprint expert's report indicated that he could not identify latent fingerprints with any given suspect. Further, counsel was told that regarding the conflict in statements attributed to one appellant or the other, Detective Miller had been confused as to which appellant supposedly made the statements. Thompson was to check further on this point.

The matter of appellant Giattino being identified as a customer or frequenter of the Doll House was again brought up because Giattino had informed counsel he had been to the Doll House twice, the last time being some time before August 8, 1976 and that he was never drunk, loud or obscene when he was there.

Agent Jensen told counsel that a Jim Gammel (phonetic), a bouncer at the Doll House was the only one who said Giattino looked familiar. Jensen further advised that there was no identification as to the appellant Raucci being at the Doll House ever. In relation to this, Jensen stated words to the effect that "we may not have Raucci going to topless bars but we have him with the Molotov cocktails." In fact, Jensen told counsel that with regard to Raucci being at the Doll House, it was a "dead end." (H. 28-34, 66-67, 96, 87, 105, 108; R. 2068, 1072, A.).

At no time during these meetings (or subsequently) did AUSA Thompson or Agent Jensen provide defense counsel with the name of Carol Fein. Her importance in the case at bar will become readily apparent, infra.*

*It is interesting to note that AUSA Thompson, in his sworn affidavit in opposition to appellants' motion to set aside the verdict, at paragraph "3", states that on January 4 or 5, 1977, names then known by the government of all employees of the Doll House for several months before the offense including Carol Fein, as well as the identities of the owners of the premises and all other known tenants were provided to the defense. "(Emphasis added) (A.).

Further, during the hearing on this motion, Thompson, in his direct testimony stated that on January 4 or 5, 1977, he gave defense counsel the name of Carol Fein as an employee of the Doll House. (Emphases added) (H. 52-53). However, it becomes evident this is not true. It becomes evident when we look to Agent Jensen's testimony at the same hearing. He swears, in his direct testimony, that on January 4 and 5, 1977, he did not even know that Carol Fein existed as an employee of the Doll House, so the name could not have been given to defense counsel (H. 96). This fact is reiterated in the cross-examination of Jensen when he states that on January 4 and 5, 1977, he did not even know of Carol Fein, that AUSA Thompson would know of Fein only through him (Jensen) as the investigating agent, and he could not have told Thompson of Fein because he himself (Jensen) did not know about her. (H. 104, 197). In fact, Jensen did not know of Fein until January 10, 1977. (H. 107).

On January 10, 1977, AUSA Thompson and Agent Jensen went to the Doll House. They went there looking for "a motive for the crime, to find other parties, if there were; to find out the basis who, what, where, when and why of the crime," and "to interview the people there ... " and for Thompson to see the premises. (H. 140-141, 146; R. 1077-1078). At the Doll House, just before leaving, they met Carol Fein,* a bar maid at the topless establishment just as she was coming to start her 7:00 P.M. work shift. What follows next is not abundantly clear. Agent Jensen testified at trial as a defense sur-rebuttal witness that he showed photographs to Fein. His testimony at that time was that he showed Fein three photographs for sure, one color double "mug" shot of appellant Raucci, one color double "mug" shot of appellant Giattino and one black and white, full-length photograph of appellant Raucci.** Jensen also stated that he may have shown

*Carol Fein was called as a rebuttal witness by the Government. Defendant Raucci, testifying in his own behalf, had responded on cross-examination that he had never been to the Doll House in his whole life until the arresting officer took him there the morning of the incident. (R. 765-766, 772). Fein testified she had seen him there.

**The black and white, full-length photograph of Raucci having been taken in July, 1970, was almost exactly six years younger than the "mug" shot of Raucci that was exhibited to Fein. (R. 890).

Fein three additional color "mug" shots of three other suspect individuals. Further, it was Jensen's testimony at trial that he showed the color "mug" shot of Raucci and the black and white, full length photograph of Raucci to Carol Fein at the same time.* (R. 884-888).

*At the hearing of July 21, 1977, two and one-half months after his trial testimony, Jensen was saying that he showed Fein six photographs in a spread. Five "mug" shots, including each appellant, shown at one time and, then, separately, he showed Fein the full-length photograph of Raucci. (H. 144-148). In fact, the prosecutor went to great pains to rehabilitate Jensen's trial testimony at the hearing, finally getting him to say that he testified differently at the trial because he (Jensen) "hadn't expected the question and hadn't thought about it." and that he has since thought about it because "that was one of the purposes in trying to see if [he] could put the two defendants with any of the other persons. Mr. Brauer [two of the other "mug" shots were of the Brauer brothers H. 144] owns the competition of A&P Variety." (H. 148-150). (It should also be noted that Jensen had made no notes or report of any interview of Fein except a brief notation in his diary, on January 10, "Ray Cohen; interview, A&P and Doll House personnel, bar maid ID Raucci") (R. 1076-1077). The prosecutor went further in pointing out that when Jensen reviewed his trial testimony, he found the court reporter had him saying he showed a photograph, instead of three photographs to Fein and so he (Jensen) had, in pencil, noted "three" photographs where the trial transcript said "one." (H. 214-217).

It is, in this regard, interesting to note that if Fein were shown all the photographs, she did not tell the Government (on January 10, 1977, at any rate, and perhaps, not until the time of the hearing) that she recognized the "mug" shots of the Brauers. She, in fact, knew them (H. 226). This is surprising especially in light of the purpose Jensen had for going to the Doll House on January 10, 1977, i.e. to look for motive, to find other parties to the crime, to find out the who, what, where, when and why of the crime, to see if he (Jensen) "could put the two defendants with any of the other persons" in the "spread" (especially since one of the Brauers owned the competition of A&P Variety, Inc.). (H. 140-141, 146, 148-150). It is also surprising because, according to Jensen, he felt the people in the three other photographs could possibly be involved (R. 906) and because he asked Fein "if she knew any of the others" and she said "no." (H. 145, 162).

Jensen also testified at trial that when he showed the photographs to Fein on January 10, 1977, he really was not interested in showing her a representative spread. He did not feel the occasion called for such a showing. (R. 888-889). He further stated that Fein was able to identify only one of the photographs of Raucci, the "mug" shot. (R. 889). Thompson, with regard to this point of identification, stated to the District Court, during colloquy, in an attempt to justify why defense counsel had not been advised of Fein, that "she [Fein] was not conclusive. She was not certain. She pointed to one of the pictures and said, 'I think it's this one, I think I recognize this guy, but I'M not sure.'" (R. 1970).^{*} This colloquy, unfortunately, occurred after the District Court's charge to the jury and was the first time defense counsel learned of any uncertainty regarding Fein's identification of Raucci.

^{*}Judge Pratt, in his Memorandum and Order, dated August 11, 1977, dealt with this statement of Thompson by saying, "[c]learly, when AUSA Thompson initially argued the point of admissibility of Fein's testimony before the court, it was without extensive preparation, and his characterization of her identification as being 'uncertain' represented his overall interpretation of her reaction to two photographs and in no way implied any lack of certainty on her part as to recognizing Raucci's mug shot." (A.). It should be noted that Thompson made the statement regarding uncertainty on May 6, 1977, after the Court's charge and after extensive argument on the very point on May 5, 1977, just as Fein was taking the witness stand, an argument covering some fifteen pages of transcript (R. 825-839). There was also a discussion before the Court relating to this matter before the start of the sur-rebuttal case, and Judge Pratt specifically stated, in relation to his feelings that a post-trial hearing should be held if there were a conviction, that he wanted to know more. "One of the things I wanted to know is where and what she [Fein] said at the time." (R. 872). Surely, this should have alerted Thompson that what Fein said at the time she made any identification was important. That is not all, however. The matter was again argued before the Court when at the conclusion of all the evidence, defense counsel made a motion to strike Fein's testimony. (R. 914-918). Then came summations the charge and the colloquy initially referred to. Certainly, Thompson had as much time for "extensive preparation" as defense counsel had in his responses to the Court.

Following the January 10, 1977 episode, defense counsel met with AUSA Thompson at his office on January 11 and 21, 1977. (A. ; H. 34, 57). Although defense counsel had been told appellant Giattino was identified as having been in the Doll House on a number of occasions, counsel was never told that Raucci had been so identified. In fact, between January 5, 1977, when counsel was specifically told Raucci could not be identified as ever having been at the Doll House and the start of the trial on May 2, 1977, defense counsel spoke to, by telephone, or met with AUSA Thompson (at times in the presence of Jensen) some seventeen (17) times. (A. ~~138~~/67; H. 32).*

B. The Trial

The Government's direct case consisted of the testimony of six Suffolk County police officers, a fingerprint expert, a chemist and an "explosive enforcement analyst."

*In fact, subsequent to January 10, 1977, the Government told defense counsel the original information regarding appellant Giattino at the Doll House was incorrect (H. 98-99, 122-126), yet, the Government never took this opportunity to tell defense counsel Raucci was recognized as being at the Doll House.

Police Officer Reiersen was the police officer who first saw a flash of flames at the building housing the Doll House. He was the only witness who testified that the appellants were leaving the vicinity of the Doll House and he pursued them. None of the other police officers, none of the witnesses, saw the appellants near the Doll House. The case came down to whether the jury would believe his version of what happened or appellant Raucci's version.*

The first witness called by the Government was Thomas Esgro, the proprietor of the Doll House. He basically set the scene of the physical area immediate to the Doll House building. There are no other buildings near it, there are woods behind and to some extent along side it and there is a small parking lot and a dirt extension of the parking lot, a dirt road, apparently. (Esgro used this road to get from a side street he was on to the parking lot of the Doll House on August 8, 1977, after being notified of the incident at his place. (R. 82-83)). Esgro also testified he closed up the place and left at about 5:00 a.m. A short time later, he was notified by the police of the attempted arson. He stated, too, that the lighting in the area of the lot and dirt road is poor, in fact, no light on the area of the dirt road (R. 88). Esgro, as did all of the police officers, testified that there was a steady rain, and it was dark and further, there

*The District Court indicated this was so on a number of occasions, at trial, at the hearing and in its Memorandum and Order of August 11, 1977. (A. 82)

was virtually no damage to the Doll House building. (R. 100-101). Esgro never saw anyone throw any firebomb at the building, in fact, he stated he never saw either appellant before. (R. 66).

Before the next witness was called, defense counsel notified the District Court that in reviewing the grand jury minutes of Police Officer Reiersen during the recess after Esgro testified (and as soon as was possible since he had only just been provided the minutes by the prosecutor), he had found that Riersen testified in the grand jury that appellant Giattino had asked for an attorney and that Reiersen and other police officers had continued to question him. The Court, after questioning the prosecutor as to why this had not been brought out earlier, ordered a suppression hearing regarding alleged statements of appellant Giattino. The hearing would also encompass the legality or illegality of the search of Giattino's car. (R. 114-121). After the hearing, the Court determined that the search of the automobile was illegal, and, so, any evidence (a wallet and an address book) as a result of the search was inadmissible. The Court also found that all the alleged statements, except one where Giattino was alleged to have said he left his head home in answer to a pedigree question, were improperly obtained and, so, inadmissible in the Government's case in chief. (R. 198-204).*

Police Officer Arthur Reiersen was the first witness called after the suppression hearing. He testified that on August 11, 1976, at approximately 5:30 A.M. it was raining

*Perhaps it should be noted that with regard to these statements, Suffolk County Police records first had Raucci stating them. It was later their position that Giattino made the statements. He had always denied this. (R. 28-31).

heavily, it was dark and traffic was light. (R. 229-230, 239, 247, 308). Reiersen had been out of his assigned sector and with a number of other police officers (in their own cars and each of whom testified) who had "gathered" at a state yard (R. 231-237, 298-301, 314). After this gathering, Police Officer Reiersen proceeded eastbound on Sunrise Highway toward his own sector. On the way, he approached the Doll House, traveling at about forty miles per hour. When he was approximately three tenths of a mile, from the Doll House, he saw a flash and decided to speed up, eventually reaching a speed of about sixty miles an hour and finally coming almost at a stop just before turning into the western portion of the parking lot of the Doll House. On the way, a billboard west of the Doll House had obstructed his view for a number of seconds. It apparently took Reiersen approximately eighteen to twenty-seven seconds to get from where he first saw the flash to the western end of the parking lot. (R. 239-241, 244, 315-319, 354-355, 414-415).

Reiersen also testified that as he was about to turn into the parking lot, seeing what he believed to be the building in flames, he was getting ready to make a transmission on his police radio regarding the fire. At this point, he says he saw a dark car making a fast exit from the other end of the parking lot.* (R. 241-243, 320, 323, 325-226). Reiersen was looking at the flames and looked for other cars or other people when he saw the dark car exiting the parking lot. (R. 244). He was nervous, excited and confused. (R. 320-321, 347-349). This was apparent

*It is interesting to note that at trial, all through his testimony Reiersen described the car as dark and then at one point a brown, 1969 Oldsmobile. However, the police report described the car as blue, in his grand jury testimony Reiersen called it a 1969 Buick and in the suppression hearing held during the course of the trial, he called it a 1969 Buick. Mr. Giattino's car is a 1969 brown Oldsmobile.

to those officers who heard Reiersen's transmissions (R. 441, 449, 495). Apparently, too, Reiersen had to decide whether to report and attend the fire (see if anyone in building) or chase the automobile he said he saw. This decision took him, he says, three seconds. (R. 326-327). He transmitted the fire, this taking at least eleven seconds and proceeded after the dark car, making a second transmission that he was in pursuit.* Fourteen seconds from having seen the car,^{he} took up pursuit. (R. 324-327, 350, 352-353, 450-451, 496-497).

Reiersen testified he pursued the dark vehicle eastbound on Sunrise Highway and when they approached the intersection of Lakeland Avenue and Sunrise Highway (about a mile and a half from the Doll House, Police Officer Colligan was in the right turning or shoulder lane of a four lane portion (including a left turning lane) of Sunrise Highway with the lights on his patrol car blinking. The dark car entered the left turning lane of Sunrise Highway and made a left turn, going north on Lakeland Avenue. Reiersen and Colligan followed the car for about 200 to 300 feet along Lakeland, where it pulled over (not forced over) about 200 feet south of Westgate Drive, the entrance road to a group of apartment houses. Reiersen arrested Giattino and Colligan arrested Raucci. They were brought to the parking lot of the Doll House before being taken to the precinct house for processing. (R. 248-253, 336-346). While he was at the Doll House, Reiersen noted there was virtually no damage done to the building where the Molotov cocktails were thrown. (R. 260).

*Sergeant Dean, in his direct testimony, stated that after transmitting the fire, Reiersen transmitted he had a vehicle leaving the area, not the parking lot. (R. 496).

Five other police officers testified; none of these saw the appellants or Giattino's car leave the area of the Doll House. Indeed, none of these officers, save for Officer Colligan, saw these appellants or Giattino's car after they were arrested by Reiersen and Colligan. (Colligan saw the car just prior to its left hand turn on Lakeland Avenue.)*

The prosecution also called Gary Walton, a fingerprint expert with the Bureau of Alcohol, Tobacco and Firearms. He basically testified that neither of the appellant's fingerprints could be determined to be on any of the evidence seized at the scene of the crime, to wit, a butane lighter, an unbroken bottle containing a cloth wick and naptha and fragments of a broken bottle.**

Willi Thurman, a chemist for the Bureau of Alcohol, Tobacco and Firearms, next testified for the prosecution. He testified that naptha was the fluid present in the bottle that had not broken.***

The Government then called Arthur Cunn, an "explosive enforcement analyst" (R. 597) for the United States Treasury. He testified that the two devices (the whole bottle and the bottle fragments) were Molotov cocktails, something appellants stipulated to. (R. 599). He also explained how a Molotov cocktail worked.

*As the District Court had stated, it was basically a case of Reiersen's version against Raucci's version as to what happened.

**No evidence relating to the crime was seized from the persons of Giattino and Raucci or from Giattino's car. There was only an address book and wallet found.

***On cross-examination, he testified^{that} even a little naptha spilled on clothing would smell for several minutes at least, especially on a rainy, humid day. (R. 594-595). There was no testimony by any Government witness that upon arrest either appellant smelled of naptha.

The Government then rested, appropriate defense motions were made and denied (or decision was reserved). Appellant Raucci was the first defense witness. (R. 700). He basically testified that appellant Giattino, Raucci's uncle, had, earlier in the week, told him that he would be over Saturday night (August 7, 1976) and that he (Giattino) wanted Raucci to accompany him to an all night card game at a friend's home. Giattino and Raucci were to be partners, each putting up half the money to play with. Giattino, who played poker often and was a better layer than Raucci (who played only occasionally) would do the card playing for both of them. Giattino arrived at Raucci's home at approximately 11:00 p.m., they socialized and finally Raucci, apparently reluctantly, at about 2:30 a.m., decided to go to the card game. They each put up one hundred dollars. Giattino drove. (R. 700-703, 726-734, 738).

Raucci and Giattino arrived at Giattino's friend's home for the card game in Patchogue at about 3:30 - 4:00 a.m. This was the first time Raucci was there. Giattino had been there frequently. When they arrived, they found the game was full (ie. there were already eight players). Raucci was introduced to the owner and then he was introduced to the others at the card game. Raucci and Giattino stayed around for awhile and spoke to one or two people. They learned that there would be a couple of seats opening up at around 6:00 a.m. Giattino made a call to another card playing friend, Frank DeFelice, who did not live too far away, to ask him if he would want to fill in one seat in a poker game at about 6:00 a.m. This call was made so that at about 6:00 a.m. the game would remain full. DeFelice agreed. Appellants then left the card game at about 4:45 a.m. and proceeded to DeFelice's home in Oakdale. On Sunrise Highway,

in the vicinity of Oakdale, appellants stopped at a Dunkin' Donuts restaurant for coffee and donuts and to give DeFelice more time to get ready since he was told they would be there a little before 6:00 a.m. The Dunkin' Donuts was located just west of Lakeland Avenue, the road they were to take from Sunrise Highway to DeFelice's home.. (R. 704-711, 738-739). Subsequently, appellants left Dunkin' Donuts to proceed to DeFelice's home at some time after 5:30 a.m. They exited the parking lot on to Sunrise Highway heading west for a very short distance and then made a U-turn around the divider at the first intersection (Oakdale - Bohemia Road) and proceeded east on Sunrise Highway so that they could make a left turn (north) on to Lakeland Avenue and arrive at DeFelice's apartment house. They were now travelling at a speed of about fifty miles per hour eastbound on Sunrise Highway. They had made the U-turn at an intersection which was in close proximity to the Doll House. (R. 712-716, 745-748). As appellants approached Lakeland Avenue, they entered the left hand turn lane and noticed officer Colligan's patrol car in the right most lane (shoulder) with its lights blinking. At this point Raucci heard police sirens behind him. Giattino made a left turn on Lakeland and two patrol cars (Reiersen's and Colligan) followed them several hundred feet up Lakeland Avenue and Giattino pulled over approximately 200 feet from Westgate Drive, the entrance Road to DeFelice's apartment house. (R. 716-725, 753-756, 760-762). During his cross-examination, Raucci stated in response to questions by the prosecutor that he had never been to the Doll House in his whole life. (R. 765-766, 772).*

*Some time afterwards (ten pages of transcript), the Court recessed for lunch, with cross-examination of Raucci to continue, the prosecutor indicating he had another twenty to twenty-five minutes of cross-examination. (R. 775)

The next defense witness was Frank DeFelice. He testified he lives in the Westgate apartments off Lakeland Avenue. He also stated in the early morning of August 8, 1976, between 4:00 and 5:00 a.m. he received a telephone call from appellant Giattino asking him if he wanted to play cards at a mutual friend's house. DeFelice has known Giattino for ten years. They are both card players and the telephone call was not unusual. In fact, Giattino "had done it before." DeFelice played cards with Giattino quite often. On this occasion, Giattino never showed up and DeFelice learned he had been arrested that morning. (R. 797-802)

The last defense witness called on direct was Patsy Basilicato. He testified he was at the card game in Patchogue on August 8, 1976 when Giattino (who he knew for eight years from various card games, including the one in Patchogue) and Raucci (who he met for the first time that night) came in between 3:00 and 4:00 a.m. The game was full and Giattino and Raucci waited around for a while for a seat. Basilicato stated that some seats were due to open up about 6:00 a.m. Giattino and Raucci left the house with Giattino saying he was going to pick somebody up and come back around 6:00 a.m. Giattino and Raucci never came back and Basilicato heard several days later that they had been arrested. The card game lasted until Sunday night. (R. 810-816, 819-820, 822).

*Basilicato indicated on cross-examination, that businessmen, Long Island Railroad workers and a school teacher were some of the participants in the card game. (R. 821-822).

In rebuttal, over strenuous objections of appellants, the prosecution called Carol Fein, a bar maid at the Doll House as a witness.* She testified, in marked contrast to Raucci, that he had been in the Doll House as a customer on perhaps two occasions in July 1976 and that he was thinner/^{then}than he was at trial. (R. 841-843).

The defense called two witnesses in sur-rebuttal. The first was Agent John Jensen. He testified he had been in the hall outside the courtroom with Fein sometime before she testified and that she saw Raucci standing in the hallway (during a recess) and that he (Jensen) nodded his head in Raucci's direction (R. 893-894). Jensen also testified that he had previously shown photographs to Fein, a full-length, black and white photograph of Raucci, a "mug" shot of Raucci and a "mug" shot of Giattino and that Fein was able to identify one of the photographs of Raucci, the "mug" shot. Jensen also said that he showed the full length and "mug" shot photographs of Raucci to Fein at the same time and that he may have shown Fein three other mug shot photographs of other suspects.**

The last defense witness in sur-rebuttal was Lee Johnson. Defense counsel found out of his existence at the end of the day after Fein testified. He had seen the show-up of Raucci in the

*Defense counsel had learned she was to be a witness and the first of her testimony just prior to her being called as a witness.

**This aspect has already been covered, supra.

hall outside the courtroom. Johnson had never seen either defendant before; he was in the courthouse that day and time because he drove someone else there concerning another case before the District Court that day. (R. 909-910). Johnson saw Carol Fein and Agent Jensen together outside the courtroom when Raucci was there. Johnson said Jensen had his arm around Fein and was talking to her. Jensen then pointed in Raucci's direction, Jensen and Fein spoke again (Johnson could not hear what they were saying) and then Jensen pointed again. (R. 910-912).

C. The Hearing*

On May 27, 1977, appellants filed a motion to set aside the verdict and to enter a judgment of acquittal or to grant them a new trial or that a hearing be held. On July 7, 1977, the Government's memorandum in opposition was filed. A hearing was held on July 21, 1977, and on August 11, 1977, by Memorandum and Order of that date, the District Court denied the relief sought by appellants.

At the hearing, primarily two issues were to be resolved, one relating to the fact that under the circumstances, the Government misled defense counsel in not apprising him of the fact that Raucci had been identified as a customer of the Doll House

*Much of the facts relating to the hearing have already been discussed and so will not be dealt with here.

(in fact, defense counsel had been told the exact opposite) and, secondly, that the photographic display and the show up outside the courtroom were improper and should have served as a basis to have held Carol Fein's testimony inadmissible at trial.*

*There was also raised by appellants' motion a question as to whether or not Brady material had been withheld from the defense.

ARGUMENT

POINT I

THE APPELLANTS WERE MISLED BY THE GOVERNMENT AND THEREBY
SUFFERED UNDUE AND UNREASONABLE PREJUDICE.

As indicated in the Statement of the Case, supra, the Government advised defense counsel that discovery would be liberal, that, in effect, the Government's file would be "open" to him. Appellants came to rely on this fact, especially in light of the liberal discovery provided, including a list of Government witnesses and information regarding any identification or lack of identification of either or both of the appellants.

The Government affirmatively stated to defense counsel on January 4 and January 5, 1977 (and subsequent thereto), that there was no witness who could identify appellant Raucci as ever having been at the Doll House prior to August 8, 1976. When the Government learned, on January 10, 1977, that Carol Fein could so identify Raucci, defense counsel was never advised. This, then, is not so much a question as to whether appellants were entitled by statute to such information regarding the identification of Raucci or the name of the identifying witness.* Rather, the question is, once the Government agreed to and did provide certain information, can it then produce a witness at trial who was not made known to defense counsel and whose

*Rule 16 of the Federal Rules of Criminal Procedure was intended to prescribe the minimum amount of discovery to which the parties are entitled. The House Committee on the Judiciary, in considering the rule, agreed that the parties should, to the maximum extent, accomplish discovery by themselves. The court should become involved only when it is necessary to resolve a dispute or to issue a protective order. Report of the House Committee on the Judiciary,

testimony was indeed contrary to information which the Government had previously provided to defense counsel, especially since the Government apparently knew of the witness some five days after advising counsel no such witness existed. This failure to advise counsel continued even though there were numerous discussions involving just that type of information. Certainly, given the nature and spint of the communications between the Government representatives and defense counsel, it was bad faith on the part of the Government not to advise defense counsel of the fact that Carol Fein said she could identify Raucci as having been at the Doll House. Such conduct is contrary to what Congress intended in establishing rules of discovery. It is clear that Congress believed it is desirable to promote greater pre-trial discovery. As stated in the Advisory Committee Note,

broader discovery by both the defense and the prosecution will contribute to the fair and efficient administration of criminal justice by aiding in informed plea negotiations, by minimizing the undesirable effect of surprise at trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence. Report of House Committee on the Judiciary, supra.

(footnote continued)

Report No. 94-247. In the case at bar, discovery was accomplished, by agreement, between the Assistant United States Attorney and defense counsel themselves. Surely, in view of such agreement, going to the District Court became unnecessary in the eyes of defense counsel. Surely, too, defense counsel would come to rely on the disclosures, not expecting that he would be misled.

Such conduct is also contrary to the duty of the United States Attorney, for,

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. Berger v. United States, 295 U.S. 78, 88 (1935).

It is appellants' position that a duty of disclosure was created. United States v. Miller, 411 F.2d 825 (2d Cir. 1969). The failure of the prosecutor to disclose, then, deprived appellants of a fair trial, and, so, became a breach of a constitutional duty. United States v. Agurs, 427 U.S. 97 (1976). The result of such conduct was unreasonable prejudice to the defendants. The District Court, indeed in addressing the matter of Carol Fein's testimony stressed its importance and impact upon Raucci's testimony on several occasions. The issue in the trial came down to whose version of the events would be believed, Reiersen's or Raucci's. Determining who was more credible would, for all practical purposes, resolve the issue of appellants' guilt or innocence. The identification of Raucci as being present at the Doll House had the effect of raising a strong question as to his credibility. Fein's testimony, then, was of extreme importance. (R. 872-873; H. 14; A. 82).

Fein's testimony undoubtedly greatly weakened the credibility of Raucci which was so crucial to the defense of appellants. United States v. Semensohn, 421 F.2d 1206 (2d Cir. 1970). This was not a case where the evidence against appellants was overwhelming, by any means. It was simply Raucci against Reiersen (Statement of the case, supra). In this sense, there was a

reasonable possibility that error in admitting the Fein testimony might have contributed to the convictions.* Semensohn, supra.

Appellants were also prejudiced in that if they had known of Fein's identification, they could have requested additional discovery (including the photographs shown to Fein, pinning the Government down on the number shown). Perhaps the fact that Fein did not identify two of the other "mug" shots it is claimed she was shown could have been developed to appellants' advantage in front of a jury. Then, too, investigation of Fein may have been conducted to developed information useful before Fein testified to the jury. All of this might have led to a more meaningful cross-examination of Fein. In fact, the trial prosecutor stated before the District Court that Fein's identification of Raucci on January 10, 1977 was uncertain (R. 1070). Unfortunately, this was stated after all testimony was complete, after the Court's charge. If this fact were known before Fein testified or,

*Appellant Giattino, because of alleged statements attributed to him (and which were suppressed from use in the Government's direct case) did not take the stand to testify. He, in effect, had to rely on Raucci getting the facts of the defense case to the jury, and so, he, too, had to rely on the credibility of Raucci.

It is interesting to consider that if Carol Fein's identification of Raucci were known beforehand, it may well have been more advantageous for Giattino to testify, for even though certain statements were attributed to him, they were not the most explicit statements; they were capable of being interpreted in more than one way. Beyond that, the police first attributed the statements to Raucci. In fact, their documents attribute the statements to Raucci. Defense counsel may have been able to successfully challenge their credibility.

at least, as she testified,* it could have contributed to a more effective cross-examination. Beyond that, perhaps a proper line up could have been held before trial, and we would not now encounter the question of a proper or improper show up.

Finally, proper disclosure may have led to a court hearing on the propriety of Fein's testimony and identification prior to her testimony and, not, as it happened, after the fact, after a conviction, where now the District Court, to rule in appellants' favor, would not only have to preclude testimony of a witness but, ^{would have} to, in effect, overturn a jury verdict.

*The prosecutor certainly had to see that defense counsel was trying to impeach Fein's credibility on cross-examination. Why did he not advise counsel of Fein's uncertainty of identification?

POINT II

THE PHOTOGRAPHIC SPREAD SHOWN CAROL FEIN
AND THE SHOWUP IN THE CORRIDOR OUTSIDE
THE COURTROOM CREATED A VERY SUBSTANTIAL
LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION

Carol Fein was shown photographs of appellant Raucci at least two times prior to her testimony at trial. The first time was January 10, 1977 (R. 1077; H. 140-145, 281-284). The second occasion was May 5, 1977, just prior to her testifying on behalf of the Government (R. 1067; H. 135, 290). Also, just a short time before she testified, she, while with Agent Jensen in the corridor outside the courtroom, saw the defendant Raucci standing there. It is appellants' contention that this constituted a showup. Appellants further contend that the photographic spread and the showup were unnecessarily and impermissibly suggestive and further, that under all the circumstances, the suggestive procedures gave rise to a substantial likelihood of irreparable misidentification. Therefore, the testimony of Fein, including the in-court identification of Raucci should have been excluded. Manson v. Braithwaite, 432 U.S. 98 (1977).

If the showup and the photographs were unnecessarily and impermissibly suggestive, the question arises whether Fein was identifying Raucci or the man whose photographs she was twice shown and who she saw in the corridor outside the courtroom, or whether she had a definite image of him in her mind before the improper confrontations. United States ex rel. Gonzalez v. Zelker, 477 F.2d 797 (2d Cir. 1973). The burden is on the

Government to demonstrate by clear and convincing evidence that the in-court identification was based upon observations of the defendant other than the improper confrontations. Thus, reliability becomes the determining factor. Manson v. Braithwaite, supra; United States v. Wade, 388 U.S. 218 (1967); United States v. Famulari, 447 F.2d 1377 (2d Cir. 1971).

Confrontation between a witness and an accused (by lineup, showup or photographic display) to elicit an identification is riddled with dangerous variable factors which might seriously and critically derogate from a fair trial. United States v. Wade, supra. Criminal law is rife with instances of mistaken identification. Borchard, Convicting the Innocent; Wall, Eye-Witness Identification in Criminal Cases (1965); Wigmore, The Science of Judicial Proof, sections 250-253 (3d ed. 1937). The risks of suggestion are obvious and increase the dangers already inhering in eyewitness identification. Williams and Hammelmann, Identification Parades, Part I (1963). A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which law enforcement authorities present the suspect (or the accused) to witnesses for pre-trial identification. In fact, improper suggestion upon identifying witnesses probably accounts for more miscarriage of justice than any other single factor. Wall, supra, at 26. The dangers for the defendant are particularly grave when, as in the case at bar, the witness' opportunity for observation was insubstantial. This is when such witnesses'

susceptibility to suggestion is greatest.

The Wade case, supra and Gilbert v. California, 388 U.S. 263 (1967) departed from the rule that the manner of an extra-judicial identification affects only the weight, not the admissibility of the identification testimony at trial. In Foster v. California, 394 U.S. 440 (1969), The Supreme Court said in footnote 2, at 442:

The reliability of properly admitted eyewitness identification like the credibility of the other parts of the prosecution's case is a matter for the jury. But it is the teaching of Wade, Gilbert and Stovall [v. Denno, 388 U.S. 293 (1967)], supra, that in some cases the procedure leading to eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law.

The procedures in the instant case leading to the witness identification were so defective (including being unreliable) as to make the in-court identification of Raucci inadmissible as a matter of law. If we just look to the photographic display, we find that it has been held that each case must be considered on its own facts. Convictions based on eyewitness identification at trial following a pre-trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. Manson v. Braithwaite, supra; United States v. Simmons, 390 U.S. 377 (1968). In considering some of the circumstances in the case at bar guidance can be obtained from Manson v. Braithwaite, supra,

United States v. Simmons, supra, and United States ex rel. Phipps v. Follette, 428 F.2d 912 (2d Cir. 1970). In applying the teachings of these cases, it must be asked was it necessary for Agent Jensen to show any spread at all? Appellants had been arrested some five months before Fein was first shown the spread and were indicted three months before. This, certainly, was not a case of defendants still being at large and Agent Jensen acting quickly in whatever way necessary to apprehend them. Simply put, there was no compelling justification to show the spread at all, much less to show a spread that was so suggestive and lacking other photographs of individuals who had characteristics similar to Raucci. There was no emergency to prevent Agent Jensen from collecting and showing a suitable array of photographs.

It must be kept in mind, too, that Jensen had stated that he never intended to show a representative spread. (R. 889). Could this mean that Jensen did not feel he was bound to show fair representations in the photographs. It must be remembered, too, that at the trial Jensen said he was sure he showed a "mug" shot of Raucci, a "mug" shot of Giattino and a full-length photograph of Raucci to Fein, all at the same time. He was not sure if any other photographs were included in the spread. (R. 885-889). It was not until the hearing^{over} two months later that he said he really remembered showing five "mug" shots of different individuals. Even if Jensen showed Fein as many photographs as he said he did at the hearing, these other photographs did not look like Mr. Raucci (R. 887; H. 192). Should not any of the photographs have any of Raucci's characteristics, other than the fact they were all Caucasians.

Further, we must consider the second time Fein was shown a photographic spread, May 5, 1977, shortly before her trial testimony. (R. 1067; H. 135, 290). Jensen said while Fein was waiting to testify, he "showed her the photos again, so she would know what she would see in the courtroom." (H. 188-189). Further, Jensen said he told her these were the same photographs he had shown her before. (H. 189). Then, Jensen said, "I remember I particularly pointed out Mr. Raucci's picture and told her that this was the one she picked out." (Emphasis added) (H. 190).*

*This takes an even more significance when we see there was some uncertainty in Fein's first photographic identification. (R. 1070).

If we next look to the showup in the hall, we see that, too, was impermissibly suggestive. There can be little doubt that the confrontation in the corridor qualifies as a showup. United States v. Famulari, supra.

Lee Johnson, perhaps the only truly independent, disinterested witness in all the proceedings testified that he happened to be in the corridor of the courthouse that day and saw Jensen and Fein there when Raucci was also there during a recess. Raucci was with a group of women and one other male. Jensen, with his arm on Fein appeared to be talking to her, then he pointed in the direction of Raucci. Fein and Jensen talked again and Jensen pointed again. After several minutes, they (Jensen and Fein) left the corridor area. (R. 909-912; H. 321-316). Even Jensen, in describing this incident said he was in the corridor with Fein, saw Raucci (in a group with women and one other male) looked at Fein, nodded his head and asked Fein, "do you see anybody there that you recognize." (R. 893-894; H. 137, 201-202, 206). Who else could Jensen be singling out but Raucci. Perhaps he was trying to reinforce the image of the "mug" shot of Raucci he had just previously pointed out to her, supra.

It should also be pointed out, with regard to this showup, that the District Court found it took place during an unexpected recess while Fein was in the corridor waiting to be called as a witness. This, according to the District Court, took place between 3:42 and 3:53, just before the cross-examination of Patsy Basilicato, the last defense witness.* (A. 96-97, 102,

* Upon seeing that the District Court based its findings that the showup was inadvertant upon the time of the showup during an unexpected recess, defense counsel had occasion to mention this fact to a group of relatives who attended the sentencings. As a result, additional information was ~~learned~~ that cast doubt upon the Court's findings. A motion was made to reopen the hearing, but was denied. (A. 121-137)

110). There is doubt that this is so. Appellants contend Carol Fein arrived during the lunch recess, which according to the trial court's notes was 1:15 p.m. to 2:50 p.m. Various witnesses including Johnson indicate that the showup probably occurred during the latter part of this lunch recess (H. 316; A. 121-136). Further, the time aspects involved indicate the recess had to be more than an eleven minute one when Fein viewed Raucci in the Corridor. If Fein, did in fact see Raucci during the lunch recess, it could not have been while she was in the corridor waiting to be called as a witness. Raucci still had, according to Thompson, twenty to twenty-five more minutes of cross-examination and Thompson knew there were at least two more defense witnesses to follow.

Appellants contend then that both the photographic spreads and the showup was impermissibly suggestive and probably even unnecessarily so. The next step is to see if, under the totality of the circumstances, the procedures gave rise to a substantial likelihood of irreparable misidentification. In looking at the circumstances, it must be realized that reliability is the "linchpin." Manson v. Braithwaite. To determine reliability we must look to the opportunity of the witness to view the criminal at the time of the crime, the witnesses degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself. " Manson v. Braithwaite, supra at 114; Neil v. Biggers, 409 U.S. 109 (1972).

Applying the above to the case at bar, we see Fein viewed Raucchi in a dark bar when she was serving him and other customers, she allegedly saw him, according to her own testimony, a month before the crime (so the crime would not serve to impress Raucchi in Fein's mind), and she was shown photographs some six months after the crime, without being told and without knowing that the crime was related to the photos.* Further, Fein never gave a previous description of Raucchi, and, as has been pointed out frequently, herein, her first photographic identification, to use AUSA Thompson's word, was "uncertain." Weighing all of the foregoing against the corrupting affect of the suggestive identification itself can only lead to the conclusion that Fein's testimony should have been excluded.

Further, appellants claim there are additional factors in this case which should be considered in determining reliability. For instance, at the trial, Fein said on direct examination that Raucchi was thinner when she saw him at the Doll House than he was at trial (R. 843). At the suppression hearing, she said that Raucchi was heavier when she saw him at the bar than he is now. (H. 256-258). Fein also testified at the hearing that she was not shown photographs on May 5, 1977 by Jensen (H.260). As we have already seen, Jensen was very emphatic about showing her photographs on May 5, 1977. In addition, and as has already been

*The fact that Fein said she could remember Raucchi at the Doll House because he made a sarcastic remark about one of the topless dancers, that she "was an animal" is ludicrous. It would seem that such comments would not be uncommon in such an establishment.

pointed out, supra, Fein, when asked by Jensen if she could identify anyone in an alleged five photograph spread, identified Raucci, but not both Brauer brothers, who she subsequently admitted, she knew and had recognized.

Appellants also contend that the answer to all of the foregoing is not and cannot be that Fein's testimony is collateral, and, so, it can be the result of impermissible identification procedures that give rise to a substantial likelihood of irreparable misidentification. Appellants contend the law set out in Manson v. Braithwaite, supra, applies to the case at bar, for, after all, under the circumstances of this case, with the issue for the jury being whose version of the facts should they accept Reiersen's or Raucci's, Fein's testimony had the impact of an explosion. Her testimony could scarcely be more affective if she had corroborated everything Reiersen said.*

*Something should be said, at this point, about the absence of defense counsel at the show-up. Powell v. Alabama, 287 U.S. 45 (1964) and succeeding cases (including United States v. Stovall and United States v. Wade, supra) require that the court scrutinize any pre-trial confrontation of the accused to determine whether the presence of his counsel is necessary. The Wade case, supra, has held that a line-up (even a one man line-up) is a critical stage at which counsel is necessary. Judge Weinstein, in United States v. Famulari, supra, held (and the Court of Appeals agreed) that a situation where a witness saw the defendant through a window of the courtroom door constituted a post-indictment line-up under United States v. Wade, supra. The judge found, however, that such a show-up was a mere happenstance, not arranged by the Government. However, he indicated that if this show-up was deliberately designed so the witness could identify the defendant, he would have excluded the testimony of the in-court identification. As it turned out, in his charge to the jury, Judge Weinstein instructed them to disregard the in-court identification, even though he never decided that the show-up was not mere happenstance.

Further, in United States v. Foster, supra, the Supreme Court stated that an in-court identification of the defendant by a witness after the defendant was exhibited to that witness before trial in the absence of counsel must be excluded, unless it can be established that the evidence had an independent origin or the error was harmless.

(Footnote Continued)

Further, it must be pointed out in looking at the circumstances of the case at bar, that in all the other cases where it has been found that certain impermissibly suggestive identifications were not of such magnitude to require reversal, the evidence of guilt was overwhelming. That fact does not exist in this case and, so, in no way can it be said to redeem the error committed. As the District Court itself indicated, this case came down to who the jury would believe, Raucci or Police Officer Reiersen. Certainly, then, Carol Fein's testimony directly and dramatically attacking the credibility of Raucci becomes testimony of great magnitude.

POINT III

APPELLANTS WERE IMPROPERLY DENIED ACCESS TO
EXCULPATORY MATERIAL

Appellants claim that the prosecutor knew before and during Carol Fein's testimony that her original photographic identification was uncertain. (R. 1070). It was readily apparent, too, that defense counsel was trying to impeach Fein's credibility.* However, even in light of this, the prosecutor did not divulge his feeling that Fein's identification was uncertain until after the District Court's charge to the jury.** This appellants contend, violates the mandates of Brady v. State of Maryland, 373 U.S. 83 (1963) and United States v. Agurs, supra. Such information certainly could have been used to conduct a more effective cross-examination of Fein. The result was, there was virtually no real basis to shake the credibility of Fein, whose testimony very likely struck the balance in the favor of a verdict of guilty. Assuming, arguendo, the non-disclosure was not deliberate, when we look to the appellants' harm, we can see the severe impact Fein's testimony had on Raucci's credibility. There was all likelihood that it diminished Raucci's credibility in relation to Reiersen's. United States v. Polisi, 416 F.2d 573 (2d Cir. 1969). In fact, the non-disclosure, especially in light of the impermissibly suggestive procedures and the misleading of defense counsel, may very well constitute prosecutorial

*In fact, Fein came close to saying she was never uncertain. (R. 845).

**The prudent prosecutor will resolve doubtful questions in favor of disclosure. United States v. Agurs, supra.

misconduct. United States v. Houle, 490 F.2d 167 (2d Cir. 1973);
United States v. Bonnano, 430 F.2d 1060 (2d Cir. 1970); United
States v. Polisi, supra; United States v. Miller, 411 F.2d 825
(2d Cir. 1969).

POINT IV

THE DISTRICT COURT COMMITTED ERROR IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE AND IN THE INTEREST OF JUSTICE

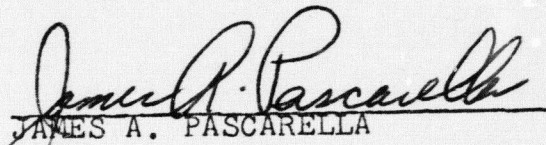
As indicated previously, the District Court found that the showup in the case at bar was inadvertant based on the fact that the Court believed the showup took place during an unexpected eleven minute recess near the end of the day. Carol Fein was presumably waiting to be called as a witness at the trial when the showup occurred. At sentencing, when a large number of appellants' relatives and friends were in attendance, counsel, in discussing the Court's decision mentioned the showup being found to have taken place between 3:42 p.m. and 3:53 p.m. At that time, various facts came to light indicating that the showup must have occurred during the luncheon recess and, therefore, Fein could not have been in the corridor for the purposes the Government had indicated when she saw Raucci. Appellants made application for a new trial on the basis of newly discovered evidence. United States v. DeSapio, 456 F.2d 644 (2d Cir. 1972); United States v. Polisi, supra. However, there was also a second basis for the motion, that being the interest of justice. It is argued, therefore, that if such evidence as claimed by appellants (A. 121-136) can be said merely to impeach Carol Fein, the case at bar, based on all the circumstances peculiar to it, merits the evidence being considered sufficiently important in the ascertainment of the truth, and in the interest of justice a new trial should be ordered. Gordon v. United States, 344 U.S. 414 (1953); Mesarosh v. United States, 352 U.S. 1 (1956); Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967).

CONCLUSION

THE JUDGMENT HEREIN APPEALED FROM SHOULD
BE REVERSED AND THE INDICTMENT DISMISSED.

February 21, 1978

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "James A. Pascarella", is written over a horizontal line.

JAMES A. PASCARELLA
Attorney for Appellants
One Old Country Road
Carle Place, New York 11514

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,
Appellee,

- against -

AFFIDAVIT
OF SERVICE

PETER FRANK GIATTINO and -
PATSY JOHN RAUCCI

77-8124

-----X

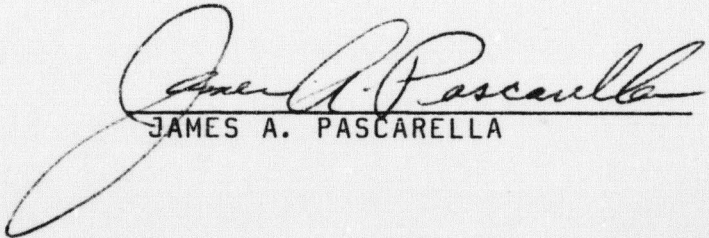
COUNTY OF NASSAU)
)
STATE OF NEW YORK) ss.:

JAMES A. PASCARELLA, being duly sworn, deposes
and says:

That on the 21st day of February, 1978, your
deponent served a copy of the within Appellants' Brief
and a copy of the within Appellants' Appendix upon the
United States Attorney's office, Eastern District of
New York, attorneys for Appellee, by depositing the aforesaid
in a proper addressed wrapper in a depository of the
United States Mail Service, addressed as follows:

Hon. David Trager
UNITED STATES ATTORNEYS OFFICE
EASTERN DISTRICT OF NEW YORK
225 Cadman Plaza East
Brooklyn, New York 11201

Dated: February 21, 1978


JAMES A. PASCARELLA

77-8124

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
APPELLEE,

- against -

PETER FRANK GIATTINO and
PATSY JOHN RAUCCI

AFFIDAVIT

JAMES A. PASCARELLA
COUNSELOR AT LAW
ONE OLD COUNTRY ROAD
CARLE PLACE, NEW YORK 11501